

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCRETE NOR'WEST AND 4M2K, LLC,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

and

FRIENDS OF NOOKSACK SAMISH
WATERSHED,

Intervenor.

Case No. 12-2-0007

FINAL DECISION AND ORDER

I. PROCEDURAL BACKGROUND

Petition for Review

On April 12, 2012, Concrete Nor'West, a division of Miles Sand & Gravel Company and 4M2K, LLC (Petitioners or CNW) filed a Petition for Review (PFR). The PFR challenges Whatcom County's denial of a requested Ordinance amending the Comprehensive Plan and zoning map to create a Mineral Resource Lands (MRL) designation and zoning overlay on approximately 280 acres of Petitioners' property. The PFR alleges the denial resulted in violations of RCW 36.70A.120 and contravenes RCW 36.70A.020(8), Whatcom County Code (WCC) 2.160 and the County's Comprehensive Plan MRL goals and policies.

1 Motions

2 An order was entered upon stipulation¹ of the parties authorizing intervention by Friends of
3 Nooksack Samish Watershed, a Washington non-profit corporation (FNSW or Intervenor) to
4 intervene on behalf of Whatcom County.²

5
6 Hearing on the Merits

7 The Hearing on the Merits (HOM) was held on August 28, 2011 in Bellingham, Washington.
8 Board members Raymond L. Paoella, Nina Carter and William Roehl participated with
9 Board member Roehl presiding. The Petitioners were represented by Margaret Y. Archer
10 and William T. Lynn. Karen N. Frakes represented Whatcom County. Intervenor FNSW was
11 represented by David S. Mann.
12

13
14 **II. JURISDICTION AND STANDARD OF REVIEW**

15 **A. Board Jurisdiction**

16 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).³
17 The Board finds Petitioners have standing to appear before the Board, pursuant to RCW
18 36.70A.280(2).⁴ The Board finds it has jurisdiction over the subject matter of the petitions
19 pursuant to RCW 36.70A.280(1).⁵
20

21 **B. Presumption of Validity, Burden of Proof, and Standard of Review**

22 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and
23 amendments to them, are presumed valid upon adoption.⁶ This presumption creates a high
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26 ¹ Stipulation for Order Granting Intervention, filed May 14, 2012.

27 ² Order Granting Intervention dated May 16, 2012.

28 ³ The County's decision to deny occurred on February 14, 2012 and the PFR was filed on April 12, 2012.

29 ⁴ The Record establishes participation standing as the action was initiated by the Petitioners and those entities
30 were involved throughout the process.

31 ⁵ In the Board's Order on Motion to Dismiss, the Board found that its jurisdiction was invoked based on the
32 Petitioners' allegation of a failure "to follow [an] established process and apply the adopted criteria." That
statement, together with the specific language of the PFR's Issue Statements, was determined to be broad
enough to include an allegation of a failure to comply with "a duty to adopt a comprehensive plan amendment
pursuant to the GMA or other law." *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.

⁶ RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable
development regulations] comprehensive plans and development regulations, and amendments thereto,
adopted under this chapter are presumed valid upon adoption."

1 threshold for challengers as the burden is on petitioners to demonstrate that any action
2 taken by the County is not in compliance with the GMA.⁷

3
4 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating
5 noncompliant plans and development regulations.⁸ The Growth Management Hearings
6 Board is tasked by the legislature with determining compliance with the GMA. The Supreme
7 Court explained in *Lewis County v. Western Washington Growth Management Hearings*
8 *Board*.⁹

9
10 The Board is empowered to determine whether [county] decisions comply
11 with GMA requirements, to remand noncompliant ordinances to [the county],
12 and even to invalidate part or all of a comprehensive plan or development
regulation until it is brought into compliance.

13 The scope of the Board's review is limited to determining whether the County has achieved
14 compliance with the GMA only with respect to those issues presented in a timely petition for
15 review.¹⁰ The GMA directs the Board, after full consideration of the petition, to determine
16 whether there is compliance with the requirements of the GMA.¹¹ The Board shall find
17 compliance unless it determines the County's action is clearly erroneous in view of the
18 entire record before the Board and in light of the goals and requirements of the GMA.¹² In
19 order to find the County's action clearly erroneous, the Board must be "left with the firm and
20 definite conviction that a mistake has been committed."¹³

21 In reviewing the planning decisions of cities and counties, the Board is instructed to
22 recognize "the broad range of discretion that may be exercised by counties and cities" and
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28 ⁷ RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] "the
29 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this
chapter is not in compliance with the requirements of this chapter."

30 ⁸ RCW 36.70A.280, RCW 36.70A.302.

31 ⁹ 157 Wn.2d 488 at 498, n.7, 139 P.3d 1096 (2006).

32 ¹⁰ RCW 36.70A.290(1).

¹¹ RCW 36.70A.320(3).

¹² RCW 36.70A.320(3).

¹³ *Lewis County v. WWGMHB* ("Lewis County"), 157 Wn.2d 488, 497-98, (2006) (citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, (1993); See also, *Swinomish Tribe, et al. v. WWGMHB*, 161 Wn.2d 415, 423-24, (2007).

1 to “grant deference to counties and cities in how they plan for growth.”¹⁴ However, the
2 County’s discretion is not boundless; its actions must be consistent with the goals and
3 requirements of the GMA.¹⁵ As to the degree of deference to be granted under the clearly
4 erroneous standard, the Supreme Court has stated:

5 The amount [of deference] is neither unlimited nor does it approximate a
6 rubber stamp. It requires the Board to give the [jurisdiction’s] actions a
7 “critical review” and is a “more intense standard of review” than the arbitrary
8 and capricious standard.¹⁶

9 Thus, the burden is on the Petitioners to overcome the presumption of validity and
10 demonstrate the challenged County decision is clearly erroneous in light of the goals and
11 requirements of the GMA.
12

13 **III. ISSUES AND DISCUSSION**

14 **The Challenged Action**

15 The “action” challenged was the decision of the Whatcom County Council to deny a
16 requested Ordinance amending the Comprehensive Plan and zoning map which would
17 have designated Petitioners’ property as Mineral Resource Lands (MRL) and amended the
18 zoning accordingly.
19

20 The Petitioners raise the following two issues:
21

- 22 1. Did Whatcom County’s action rejecting CNW’s application and the corresponding
23 proposed ordinance violate RCW 36.70A.120 since the County failed to apply the
24

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27 ¹⁴ RCW 36.70A.3201 provides, in relevant part: “In recognition of the broad range of discretion that may be
28 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the
29 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements
30 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities
31 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that
32 while this chapter requires local planning to take place within a framework of state goals and requirements, the
ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and
implementing a county’s or city’s future rests with that community.”

¹⁵ *King County v. CPSGMHB*, 142 Wn.2d 543, 561 (2000) (Local discretion is bounded by the goals and
requirements of the GMA). See also, *Swinomish Indian Tribal Community, et al. v. Western Washington
Growth Management Hearings Board*, 161 Wn.2d 415, 423-24 (2007).

¹⁶ *Swinomish Tribe*, at 435, n.8.

1 detailed designation criteria as required by the Whatcom County Comprehensive
2 Plan?

- 3 2. Did Whatcom County violate RCW 36.70A.120 and act in contravention of RCW
4 36.70A.020(8), WCC 2.160 and the MRL policies and goals set forth in Chapter 8 of
5 its Comprehensive Plan when it rejected CNW's application and the corresponding
6 proposed ordinance even though the Property and proposal satisfied the general
7 amendment criteria and all of MRL designation criteria?

8 **Applicable Law**
9

10 RCW 36.70A.020 (8):

11 Natural resource industries. Maintain and enhance natural resource-based
12 industries, including productive timber, agricultural, and fisheries industries.
13 Encourage the conservation of productive forest lands and productive
14 agricultural lands, and discourage incompatible uses.

15 RCW 36.70A.120:

16 **Planning activities and capital budget decisions — Implementation in**
17 **conformity with comprehensive plan.**

18 Each county and city that is required or chooses to plan under RCW
19 36.70A.040 shall perform its activities and make capital budget decisions in
20 conformity with its comprehensive plan.

21 Whatcom County Code Chapter 2.160 defines the types of plan amendments and
22 establishes timelines and procedures to be followed when proposals are made for
23 amending or revising the Whatcom County Comprehensive Plan.
24

25 **Board Analysis and Findings**
26

27 Initial designation of natural resource lands (and critical areas) was the first task the GMA
28 placed on jurisdictions:¹⁷
29

30 ¹⁷ *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 48: "Thus, GMA
31 required municipalities to designate agricultural lands [as well as forest lands and mineral resource lands] for
32 preservation even *before* those municipalities were obliged to declare their UGAs and adopt comprehensive
plans in compliance with GMA. The 'designation and interim protection of such areas [are] the first formal step
in growth management implementation ... to preclude urban growth area status for areas unsuited to urban
development.'" Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington:
Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867 (1993).

1 RCW 36.70A.170 (in relevant part):

2 **Natural resource lands and critical areas — Designations.**

3 (1) On or before September 1, 1991, each county, and each city, **shall**
4 **designate** where appropriate:

5 (c) Mineral resource lands that are not already characterized by urban growth
6 and that have long-term significance for the extraction of minerals;

7
8 (emphasis added).

9 Whatcom County designated its mineral resource lands in 1992 on an interim basis in
10 accordance with RCW 36.70A.170.¹⁸ Additional MRL were designated in 1997 with
11 adoption of Whatcom County's first Comprehensive Plan.¹⁹ Following a jurisdiction's initial
12 GMA comprehensive plan adoption and natural resource land designations, the GMA also
13 requires regular review of adopted plans as well as their implementing development
14 regulations:
15

16 RCW 36.70A.130

17 **Comprehensive plans — Review procedures and schedules —**
18 **Amendments.**

19 (1)(a) Each comprehensive land use plan and development regulations shall
20 be subject to continuing review and evaluation by the county or city that
21 adopted them. Except as otherwise provided, **a county or city shall take**
22 **legislative action to review and, if needed, revise its comprehensive**
23 **land use plan and development regulations to ensure the plan and**
24 **regulations comply with the requirements of this chapter** according to
the deadlines in subsections (4) and (5) of this section. (emphasis added)

25 The RCW 36.70A.130 review is specifically required to include consideration of MRL
26 designations and development regulations:

27 RCW 36.70A.131

28 **Mineral resource lands — Review of related designations and**
29 **development regulations.**

30 As part of the review required by RCW 36.70A.130(1), a county or city **shall**
31 **review its mineral resource lands designations** adopted pursuant to RCW
32

¹⁸ See Whatcom County Comprehensive Plan, Ch. 8, pp. 8-23.

¹⁹ Whatcom County Comprehensive Plan, p. 8-24; Brief of Respondent Whatcom County at p. 2.

1 36.70A.170 and mineral resource lands development regulations adopted
2 pursuant to RCW 36.70A.040 and 36.70A.060. In its review, the county or
3 city shall take into consideration:

4 (1) New information made available since the adoption or last review of its
5 designations or development regulations, including data available from the
6 department of natural resources relating to mineral resource deposits; and

7 (2) New or modified model development regulations for mineral resource
8 lands prepared by the department of natural resources, the *department of
9 community, trade, and economic development, or the Washington state
10 association of counties.

11 (emphasis added)

12 Whatcom County completed its first RCW 36.70A.130(1)(a) review in 2005.²⁰ Its next review
13 is required to be completed in 2016.
14

15 In addition to the above referenced mandatory requirements, RCW 36.70A.130(2)(a) allows
16 jurisdictions to annually update comprehensive plans:
17

18 Each county and city shall establish and broadly disseminate to the public a
19 public participation program consistent with RCW 36.70A.035 and
20 36.70A.140 that identifies procedures and schedules whereby updates,
21 proposed amendments, or revisions of the comprehensive plan are
22 considered by the governing body of the county or city no more frequently
23 than once every year....

24 Jurisdictions typically accept applications for comprehensive plan amendments on an
25 annual basis and then decide whether or not to consider them, a process known as
26 “docketing.” Pursuant to RCW 36.70A.130(2)(a), those applications which are “docketed”
27 are then considered concurrently to insure the cumulative effect of the amendments is
28 ascertained.²¹ The County has adopted “procedures and schedules” for consideration of
29 plan amendments.²² In this matter, the County accepted an application from the Petitioners
30 for a comprehensive plan amendment and zoning map change which would create a MRL
31

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²⁰ Brief of Respondent Whatcom County at p. 2.

²¹ RCW 36.70A.130(2)(b).

²² See Whatcom County Code Ch. 2.160.

1 and zoning overlay on 280 acres (adjacent to Petitioners' existing MRL) and decided to
2 docket that request. The applicable procedures for review of such proposals²³ were then
3 followed, including SEPA review and preparation of a staff report and recommendation.
4 That analysis was then forwarded to the Planning Commission. The County Code also
5 establishes the processes for review and evaluation of proposed comprehensive plan
6 amendments by the Planning Commission²⁴ and the County Council.²⁵ The Code sets forth
7 "Approval Criteria" which the Planning Commission and Council are required to find in order
8 to approve the amendment.²⁶ Included in the required planning staff analysis and report was
9 a review of the applicable Comprehensive Plan Policies and the specific designation criteria
10 for MRLs.²⁷
11

12
13 The designation criteria relevant to the Petitioners' application include the following:

- 14 6. The site shall have a proven resource that meets the following criteria:
- 15 • Construction material must meet WSDOT Standard Specifications for
16 common borrow criteria for road, bridge and municipal construction, or
17 Whatcom County standards for other uses.
 - 18 • Sand and gravel deposits must have a net to gross ratio greater than
19 80% (1290cy/acre/foot).
- 20

21 ²³ WCC 2.160.070.

22 ²⁴ WCC 2.160.090.

23 ²⁵ WCC 2.160.100.

24 ²⁶ WCC 2.160.080, (in part): "A. In order to approve an initiated comprehensive plan amendment, the planning
25 commission and the county council shall find all of the following:

- 26 1. The amendment conforms to the requirements of the Growth Management Act, is internally consistent
27 with the county-wide planning policies and is consistent with any interlocal planning agreements.
- 28 2. Further studies made or accepted by the department of planning and development services indicate
29 changed conditions that show need for the amendment.
- 30 3. The public interest will be served by approving the amendment. In determining whether the public interest
31 will be served, factors including but not limited to the following shall be considered:
 - 32 a. The anticipated effect upon the rate or distribution of population growth, employment growth,
development, and conversion of land as envisioned in the comprehensive plan.
 - b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools,
water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and
public facilities including transportation facilities.
 - c. Anticipated impact upon designated agricultural, forest and mineral resource lands.
4. The amendment does not include or facilitate spot zoning."

²⁷ Whatcom County Planning and Development Services Staff Report, Ex. 4 attached to Concrete Nor'West's
Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County Comprehensive
Plan at Chapter Eight-Resource Lands, pp. 8-18 through 8-28.

1 7. MRL Designations must not be within nor abut developed residential
2 zones or subdivisions platted at urban densities.

3 8. MRL Designations must not occur within the 10 year zone contribution
4 for designated wellhead protection areas, as approved by the State
5 Department of Health for Group A systems, and by the Whatcom County
6 Health Department for Group B systems, in accordance with source control
7 provisions of the regulations on water system comprehensive planning. MRL
8 designations may be modified if a wellhead protection area delineated
9 subsequent to MRL designation encompasses areas within a designated
10 MRL. If a fixed radii method is used to delineate a wellhead protection area,
11 the applicant may elect to more precisely delineate the wellhead protection
12 boundary using an analytical model; provided, that the delineated boundary
13 proposed by the applicant is prepared by a professional hydrogeologist; and
14 further provided, that the delineated boundary has been reviewed and
15 approved by the Washington State Department of Health for Group A
16 systems, and by the Whatcom County Health Department for Group B
17 systems. The hydrogeologist shall be selected by mutual agreement of the
18 County, water purveyor, and applicant; provided, if agreement cannot be
19 reached the applicant shall select a consultant from the list of no less than
20 three qualified consultants supplied by the County and water purveyor.

21 9. MRL Designations should not enclose by more than 50% non-
22 designated parcels...

23 11. Must demonstrate higher value as mineral resource band forestry
24 resource based upon:

- 25 • Soil conditions
- 26 • Accessibility to market.
- 27 • Quality of mineral resource.
- 28 • Sustainable productivity of forest resource

29 The staff analysis concluded that each of the above referenced criteria had been met.²⁸
30 Staff recommended approval of Petitioners' request²⁹ and the Planning Commission
31 concurred, voting to forward the staff recommendation and proposed findings to the County
32 Council for consideration and approval.³⁰

²⁸ Ex. 4, pp. 4-8, attached to Concrete Nor'West's Opening Brief.

²⁹ Ex. 8, p. 1, attached to Concrete Nor'West's Opening Brief.

³⁰ *Id.*, pg. 3

1 The County Council declined to adopt the proposed Ordinance approving the Petitioners'
2 MRL designation request, voting 3-3 with one abstention. The Council made no findings. As
3 Petitioners observe, during the Council's discussion prior to the vote, members who
4 opposed the designation failed to address the designation criteria. Rather, they referred to
5 concerns regarding environmental impacts, including one member's demand that a study of
6 mining impacts on water quality and quantity first be conducted.³¹ Petitioners' also
7 accurately assert designation of MRL in Whatcom County does not authorize mining activity.
8 Under the WCC, site-specific environmental review is conducted during the permitting
9 process.³²

10
11
12 Petitioners observe the County adopted specific criteria to be applied in addressing MRL
13 designation requests. Pursuant to such a request from the Petitioners, they state both the
14 County Planning Staff and Planning Commission concluded the application met all the
15 designation criteria and recommended that the County Council approve the designation.
16 Petitioners argue the ultimate Council denial was not based on consideration of the MRL
17 designation criteria but rather on factors beyond those criteria: response to public opposition
18 and a desire for a site-specific water quantity and quality analysis prior to designation.
19 The underpinning of Petitioners' argument is that RCW 36.70A.120 requires jurisdictions to
20 act in accordance with their comprehensive plans: "Each county... shall perform its activities
21 ... in conformity with its comprehensive plan." They then assert Whatcom County's MRL
22 designation process³³ was adopted to carry out numerous Comprehensive Plan goals and
23 policies, and the application met each and every applicable criterion for designation. The
24 Petitioners assert the Council failed to address or apply the designation criteria, but instead
25 treated the designation request like a site-specific project permit application.

26
27 The County's position can be simply stated: In order to prevail, the Petitioners must show
28 the County had a duty to act and they have failed to establish the existence of such a duty.

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³¹ Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-12.

³² Chapter 20.73 WCC.

³³ Set forth at Ex. 34, pp. 8-27 and 8-28.

1 Citing the *Stafne* decision, the County asserts Petitioners' remedy lies not with the Board,
2 but through a "proposal at the County's next docketing cycle or mandatory review or through
3 the political or election process."³⁴
4

5 In this matter, the County observes its Comprehensive Plan "does not mandate that all
6 property meeting the MRL designation criteria must be designated...."³⁵ Beyond that, the
7 County states a Comprehensive Plan amendment must also meet the approval criteria of
8 WCC 2.160.080, which includes the necessity of a County Council finding that the public
9 interest will be served. In that regard, the County sets out in detail references to concerns of
10 the public related to the proposal.
11

12 Intervenor defers to and adopts the County's Brief and restates the argument that
13 Petitioners can prevail only if they establish a duty to act. It argues Petitioners failed to cite
14 any GMA or County legislation imposing such a duty. While not effectively disputing
15 Petitioners' application met the MRL designation criteria, Intervenor, like the County, cites
16 WCC 2.160.080 which allows consideration of the public interest.³⁶
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19 With that background, the Board's analysis begins with *Stafne v. Snohomish County* in
20 which the Court stated the following:
21

22 While RCW 36.70A.130 authorizes a local government to amend
23 comprehensive plans annually, it does not require amendments. Moreover, *it*
24 *does not dictate that a specific proposed amendment be adopted.* [When] the
25 County takes an action pursuant to the authority of RCW 36.70A.130 or fails
26 to meet a duty imposed by some other provision of the GMA, [the petitioner]
27 may have an action that could properly be brought before the Board.³⁷
(emphasis added)

28 The Board concurs with the County and Intervenor: The Petitioners can prevail if, and only
29 if, the GMA, the County's Plan or its development regulations impose a duty on the County
30
31

32 ³⁴ *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.

³⁵ Brief of Respondent Whatcom County at 7.

³⁶ WCC 2.160.080 (A)(3), set out in its entirety at n.26.

³⁷ 174 Wn.2d 24, 37.

1 to designate MRL during an annual update when all applicable designation criteria are
2 met.³⁸

3
4 Due to the 3-3 tie vote by the County Council on the requested MRL designation ordinance,
5 the County's attorney took no position at the HOM on whether the designation criteria were
6 met, and the record contains no actual findings of fact by the County Council. However, the
7 staff report stated the application met the applicable designation criteria.³⁹ Assuming
8 *arguendo* that the designation criteria were satisfied, the Petitioners failed to cite any GMA
9 provision that imposes a duty to designate property as MRL when it meets a jurisdiction's
10 designation criteria. However, in light of the RCW 36.70A.120 obligation for a jurisdiction to
11 act " . . . in conformity with its comprehensive plan . . .", the Board's inquiry must necessarily
12 turn to the Comprehensive Plan. Do either Whatcom County's Plan or its development
13 regulations include a duty to designate an applicant's property as MRL during its annual
14 update when the property meets the designation criteria?
15
16

17 The Petitioners cite in support of their argument numerous Comprehensive Plan Resource
18 Lands Goals and Policies as well as the designation criteria. However, the fatal flaw in
19 Petitioners' argument is the lack of language in any of the cited Goals/Policies or the
20 designation criteria that require the County to designate lands as MRL⁴⁰ when the
21 designation criteria are met. By way of example, Policy 8P-1 provides the County should
22 "seek" a 50 year supply of aggregate; it does not mandate such a supply.⁴¹ In addition, that
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28 ³⁸ The County did not challenge Petitioners' assertion all designation criteria had been met. In a footnote
29 Intervenor did raise an assertion that Criterion 9 had not been met. The Staff Report contradicts Intervenor's
30 argument.

31 ³⁹ Whatcom County Planning and Development Services Staff Report (p. 32), Ex. 4 attached to Concrete
32 Nor'West's Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County
Comprehensive Plan at Chapter Eight-Resource Lands, pp.. 8-18 through 8-28.

⁴⁰ See also *Concrete Nor'West v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion at 13,
February 28, 2008): "Goals 8H, 8K, 8P and 8P-1 state general objectives of the County's mineral resource
lands strategy; they do not require any particular action with respect to the Petitioner's application."

⁴¹ The Record, including the Staff Report, supports a conclusion that the County does not currently have a 50
year supply designated.

1 same Policy is to be pursued to the “extent compatible with protection of water
2 resources....”⁴²

3
4 Petitioners argue this Board's decision in *Franz v. Whatcom County Council*⁴³ found an
5 MRL designation in Whatcom County does not constitute a right to mine and that site-
6 specific review is conducted at the administrative level. While Petitioners' argument is
7 accurate, those facts do not lead to a conclusion the Whatcom County Council was required
8 to approve the MRL designation request.
9

10 The Board decision in a prior CNW case is also cited by way of support.⁴⁴ There the Board
11 dismissed on motion the Petitioner's claim as it had failed to assert the property met the
12 MRL designation criteria and that designation was therefore required. Those assertions
13 were made in this case. However, it is the second prong of the Board's ruling in that prior
14 decision Petitioners have failed to establish; that the County Comprehensive Plan *requires*
15 designation.⁴⁵
16

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18 The *Stafne* Court quoted the Central Board's decision in *Cole, et al. v. Pierce County* with
19 approval:

20 While RCW 36.70A.130 authorizes a local government to amend
21 comprehensive plans annually, it does not require amendments. Moreover, it
22 does not dictate that a specific proposed amendment be adopted.⁴⁶

23 That observation is similarly appropriate here. A local government legislative body has the
24 discretion to adopt or reject a particular proposed comprehensive plan amendment in the
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28 ⁴² Protection of water resources was one of the concerns raised by those opposed to the MRL designation.
See Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-11.

29 ⁴³ Case No. 05-2-0011, (FDO, September 19, 2005).

30 ⁴⁴ *Concrete Nor'West v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion, February 28,
2008).

31 ⁴⁵ *Id.* at 2: “We note that a claim that the County failed to follow the criteria and process for a designation
32 change adopted in its comprehensive plan would state a claim upon which the Board could act. However,
Petitioner did not allege that its property met the County's designation criteria for mineral resource lands **and
that the County's plan required the designation change requested by Petitioner.**” (emphasis added)

⁴⁶ Case No. 96-3-0009c (July 31, 1996, FDO) at 10.

1 absence of a GMA or comprehensive plan mandate.⁴⁷ The Petitioners have failed to
2 establish the existence of a mandate.⁴⁸

3
4 In this matter, the Board lacks the authority to grant relief to the Petitioners as they have
5 failed to meet their burden of proof to establish the GMA or the Whatcom County
6 Comprehensive Plan (or other law) mandates adoption of the proposed MRL amendment.
7

8 **Conclusion**

9 The Board concludes the Petitioners have failed to meet their burden to establish a violation
10 of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County Code 2.160 and the County's
11 MRL goals and policies.
12

13 **IV. ORDER**

14 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
15 parties, the Growth Management Act, prior Board Orders and case law, having considered
16 the arguments of the parties, and having deliberated on the matter, the Board, having
17 concluded the Petitioners have failed to demonstrate the decision of Whatcom County was
18 a clearly erroneous violation of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County
19 Code 2.160 and the County's MRL goals and policies, this appeal is denied and Case No.
20 12-2-0007 is dismissed.
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30 ⁴⁷ *Stafne v. Snohomish County*, 174 Wn.2d 24, 38: "We agree with the board's determinations in cases like
31 *Cole* and *SR 9/US 2 LLC*. County and city councils have legislative discretion in deciding to amend or not
32 amend their comprehensive plans. Absent a duty to adopt a comprehensive plan amendment pursuant to the
GMA or other law, neither the board nor a court can grant relief (that is, order a legislative discretionary act). In
other words, any remedy is not through the judicial branch."

⁴⁸ The Board observes that this matter involved an RCW 36.70A.130(2)(a) annual review. Whether or not a
similar result would be reached had this case been a challenge to an RCW 36.70A.130(1)(a) and RCW
36.70A.131 review remains an open question.

1 Entered this 25th day of September, 2012.

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3 _____
4 William Roehl, Board Member

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6 _____
7 Nina Carter, Board Member

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9 _____
10 Raymond L. Paolella, Board Member

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13 **Note: This is a final decision and order of the Growth Management Hearings Board**
14 **issued pursuant to RCW 36.70A.300.⁴⁹**
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31 ⁴⁹ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all
32 parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days
as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent
upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings
Board is not authorized to provide legal advice.